THE COMMONWEALTH OF MASSACHUSETTS

**DEPARTMENT OF**
**TELECOMMUNICATIONS and CABLE**

**RULING ON MOTIONS FOR CONFIDENTIAL TREATMENT**
**FILED BY VERIZON NEW ENGLAND, INC.**

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## I. INTRODUCTION

On February 1, 2007, Verizon New England, Inc. d/b/a Verizon Massachusetts ("Verizon") filed a motion ("February 1 Motion") requesting confidential treatment for certain information provided on the Form 500 Annual Report of Complaint Data filed on January 31, 2007, with the Department of Telecommunications and Cable ("Department"), formerly known as the Cable Television Division of the Department of Telecommunications and Energy.[1] Specifically, Verizon seeks protection from public disclosure of the number of subscribers to Verizon's FiOS TV service in each municipality in which it provides such service (February 1 Motion at 1). As grounds for its request, Verizon stated that the number of subscribers it serves in a particular community is competitively sensitive information and constitutes a trade secret under Massachusetts law (Id.). On March 15, 2007, Verizon filed a second motion ("March 15 Motion") (jointly "Verizon's Motions") requesting confidential treatment for similar information contained in its Annual License Fee filing provided to the Department. As grounds for this request, Verizon stated that the number of its subscribers both statewide and in each municipality is competitively sensitive information and constitutes a trade secret under Massachusetts law (March 15 Motion at 1). Except for the specific references to Form 500 in Verizon's February 1 Motion, the two motions are substantively

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[1] Pursuant to Governor Patrick's Reorganization Plan, Chapter 19 of the Acts of 2007, the Department of Telecommunications and Energy ceased to exist, effective April 11, 2007. The Department of Telecommunications and Cable has assumed the duties and powers previously exercised by the Cable Division under General Laws, Chapter 166A.

identical.

The Department received two oppositions to Verizon's February 1 Motion. RCN filed an Opposition on February 7, 2007 ("RCN Opposition"), and the New England Cable and Telecommunications Association ("NECTA") filed an Opposition on March 22, 2007 ("NECTA Opposition"). Subsequently, on April 10, 2007, NECTA informed the Department that it opposed Verizon's March 15 Motion for the same reasons that it opposed Verizon's February 1 Motion.

## II. STANDARD OF REVIEW

Information filed with the Department may be protected from public disclosure pursuant to General Laws Chapter 25C, Section 5,[2] which states in part that:

> the [D]epartment may protect from public disclosure trade secrets, confidential, competitively sensitive or other proprietary information provided in the course of proceedings conducted pursuant to this chapter. There shall be a presumption that the information for which protection is being sought is public information and the burden shall be upon the proponent of such protection to prove the need for such protection. Where such a need has been found to exist, the [D]epartment shall protect only so much of the information as is required to meet such need.

This section is identical to the statute applicable to our predecessor agency, the Department of Telecommunications and Energy. See G.L. c. 25, § 5D. Accordingly, the precedent and standard of review, under G.L. c. 25, § 5D, developed by the former Department of Telecommunications and Energy and applied on motions for confidentiality in telecommunications and cable matters are applicable here.

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[2] As codified by St. 2007, c. 19.

Chapter 25C, Section 5 permits the Department, in narrowly defined circumstances, to grant exemptions from the general statutory mandate that all documents and data received by an agency of the Commonwealth are to be viewed as public records and, therefore, are to be made available for public review. See G.L. c. 66, § 10; G.L. c. 4, § 7, cl. Twenty-sixth. Specifically, Section 5 is an exemption recognized by G.L. c. 4, § 7, cl. Twenty-sixth (a) ("specifically or by necessary implication exempted from disclosure by statute").

Section 5 establishes a three-part standard for determining whether, and to what extent, information filed by a party in the course of a Department proceeding may be protected from public disclosure. First, the information for which protection is sought must constitute "trade secrets, [or] confidential, competitively sensitive or other proprietary information;" second, the party seeking protection must overcome the G.L. c. 66, § 10, statutory presumption that all such information is public information by "proving" the need for its non-disclosure; and third, even where a party proves such need, the Department may protect only so much of that information as is necessary to meet the established need and may limit the term or length of time such protection will be in effect.

Previous applications of the standard reflect the narrow scope of this exemption. See Boston Edison Company: Private Fuel Storage Limited Liability Corporation, D.P.U. 96-113, at 4, Hearing Officer Ruling (March 18, 1997) (exemption denied with respect to the terms and conditions of the requesting party's Limited Liability Company Agreement, notwithstanding requesting party's assertion that such terms were competitively sensitive); see also, Standard of Review for Electric Contracts, D.P.U. 96-39, at 2, Letter Order

(August 30, 1996) (Department will grant exemption for electricity contract prices, but "[p]roponents will face a more difficult task of overcoming the statutory presumption against the disclosure of other [contract] terms, such as the identity of the customer"); Colonial Gas Company, D.P.U. 96-18, at 4 (1996) (all requests for exemption of terms and conditions of gas supply contracts from public disclosure denied, except for those terms pertaining to pricing).

## III. VERIZON'S MOTIONS FOR CONFIDENTIAL TREATMENT

Verizon's principal argument is that the release of subscriber information reported on the Form 500, and included with the license fee payments, is competitively sensitive (February 1 Motion at 3-5; March 15 Motion at 3-5). According to Verizon, the subscriber information would allow its competitors to know the number and location of Verizon's FiOS TV subscribers, allowing them to tailor marketing strategies to quash nascent competition (February 1 Motion at 3; March 15 Motion at 3). Verizon expresses concern that the subscriber totals would provide its competitors with important information concerning Verizon's success in those areas in Massachusetts where it is providing FiOS service, thus enabling these competitors to "identify and exploit Verizon's competitive information in particular areas" and "tailor customer retention efforts to prevent the success of Verizon's entry" (February 1 Motion at 4; March 15 Motion at 4). Verizon also expresses concern that historical data on its subscribership would provide competitors with insights into how Verizon is focusing its investment and marketing efforts (February 1 Motion at 5; March 15 Motion at 5). Verizon also asserts that the changing cable landscape in Massachusetts requires the

Cable Division to take account of competition, and that Verizon should be allowed to maintain the confidentiality of its data, which if released, would give its competitors advantages in the marketplace (February 1 Motion at 5; March 15 Motion at 5). Verizon asserted that the fact that cable operators have previously disclosed this information in the past in a non-competitive environment is not dispositive in today's competitive landscape (id.). Verizon also proposed to keep the information confidential for two years after the filing of the Form 500 or the Annual License Fee filing (February 1 Motion at 6; March 15 Motion at 6).

## IV. SUMMARY OF OPPOSITION

In its Opposition, RCN states that it has long been required to submit its subscriber information, as have all other cable operators in the Commonwealth, without the benefit of confidential treatment (RCN Opposition at 1). RCN claims that Verizon's information is no more sensitive than RCN's, and that Verizon should be treated no differently than any other cable operator (id.). RCN, the original competitor in the Massachusetts cable television market, submits that Verizon is not unique, and should not be granted a special exception from the rules (id. at 2). RCN urges the Department to deny Verizon's February 1 Motion or, in the alternative, grant identical treatment to all other cable operators' Form 500 disclosures in areas where there is competition (id. at 1).

NECTA asserts that Verizon's Motions were fatally defective in multiple respects (NECTA Opposition at 4). NECTA states that the Motions failed to discuss the applicable standards for confidential treatment or to cite or apply any Department precedent (id.). More specifically, NECTA argues that Verizon failed to provide persuasive grounds for why the

information on Form 500 merits protection as a "trade secret" under the strict and narrow standards of G.L. c. 25, § 5D (id. at 2). NECTA states that Verizon's Motion is limited to the types of "vague assertions" that the Division and the Department have rejected (id. at 5, citing Charter Communications, CTV 01-8, "Interlocutory Order on Motion for Confidential Treatment" (2003)). NECTA also states that Verizon did not address how its request for confidentiality comports with the purposes of the FCC Form 500, the annual license fee payments under G.L. c. 166A, § 9, or the disclosure of subscriber data in connection with many municipal cable licenses (id. at 5).

NECTA further argues that Verizon's claim that subscriber totals would allow competitors to know where Verizon has been successful in acquiring customers ignores that information regarding basic subscribers in a municipality is of relatively limited value to competitors (id. at 6). NECTA argues that cable providers, through review of Verizon's marketing materials and analysis of their own subscriber churn, already have, or can easily gain, a very good sense of the number and location of Verizon's cable subscribers and can easily determine where Verizon is focusing its marketing efforts (id.). NECTA criticizes Verizon's argument concerning the failure of other cable operators to object to disclosure in a "non-competitive" environment (id.). NECTA states that the market has been competitive and that the failure of these competitors to seek protective treatment of their subscriber data is highly probative proof that subscriber data does not need protection from public disclosure (id. at 6-7).

Finally, NECTA asserts that Verizon's Motion ignores the public policy need for

disclosure of municipal subscriber information as part of the Form 500; the complaint data that is reported on the Form 500 can only be properly analyzed if the number of subscribers against which it can be compared is publicly available (id. at 7). NECTA provides an example: 20 complaints or service interruptions in a system with 20,000 subscribers may denote excellent performance, but be disastrous in a system with a few hundred subscribers (id.). NECTA states that granting Verizon's request would fatally undermine the public policy basis for the Form 500 reporting of complaint data (id.).

## V. ANALYSIS AND FINDINGS

Verizon bears the burden of proving that the information for which protection is sought constitutes "trade secrets, confidential, competitively sensitive or other proprietary information," and of overcoming the presumption that this information is public information. G.L. c. 25C, §5. In its Motions, Verizon listed six factors contained in the Restatement of Torts, § 737, which determine whether information qualifies as a trade secret (February 1, 2007 Motion at 1-2; March 15, 2007 Motion at 1-2, citing Jet Spray Cooler, Inc. v. Crampton, 361 Mass. 835, 840, 282 N.E. 2d. 921, 925 (1972)).[3] While relying on these six well-established factors, Verizon focuses its arguments on the fourth factor, the value of the information to its competitors.

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[3] In its Motions, Verizon also cited, in support of its position, Mountain States Telephone and Telegraph Company v. Department of Public Service Regulation, 191 Mont. 277, 634 P. 2d 181 (1981). This case was overruled with respect to the protective order and trade secret issues in Great Falls Tribune v. Montana Public Service Commission, 319 Mont. 38, 82 P. 3d 876 (2003).

In the Department's analysis of this matter, the Department also looks to two important factors: the extent to which the information is known generally in the industry and the ease or difficulty with which the information could properly be acquired or duplicated by others. The American Law Institute has defined trade secrets as follows:

> "[t]he subject matter of a trade secret must be secret. Matters of public knowledge or of general knowledge in an industry cannot be appropriated by one as his secret. …. [A] substantial element of secrecy must exist, so that, except by the use of improper means, there would be difficulty in acquiring the information."

American Law Institute, Restatement of Torts, § 757, Comment b (1939). Thus, Verizon's subscriber totals might be considered trade secrets if the information were not generally known in the industry or if the information were not easily acquired, appropriately, by competitors. The Department finds that the number of subscribers Verizon serves does not qualify as a trade secret for the following reasons.

Pursuant to G.L. c. 166A, § 10, a cable provider must file the Form 500 with both the Department and the applicable municipality. In addition, a cable operator must remit an annual license fee of $0.80 per subscriber to the Commonwealth and $0.50 per subscriber to each municipality in which it serves. G.L. c. 166A, § 9. Therefore, since municipalities are subject to the public records law, the information for which Verizon seeks protection is also publicly available in each municipality.[4] Verizon did not aver that it had sought to protect the

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[4] With respect to the Annual License Fee application, required pursuant to G.L. c. 166A, § 9, even if the cable operator did not provide an actual subscriber total, any interested person could easily derive the number of subscribers by dividing the amount of the check by the municipality's license fee of $0.50 per subscriber. Thus, at the municipal

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information filed at the municipal level from public disclosure. Nor did Verizon claim that the public would in some way be prevented from inspecting the information at the local town or city hall. Moreover, Verizon did not address whether under Massachusetts municipal law, municipalities have the legal authority to keep the amount of any such license fee payments confidential. Consequently, Verizon's motion, if granted, would serve only to make the process of obtaining the information slightly more labor intensive as the request for information would be made to individual communities rather than a single state agency. We conclude that since the information is easily available to the public at the municipal level, there is no need for the Department to protect the information from public disclosure filed with us.

Even if Verizon were to establish that the information would be protected at the municipal level, we find that the information for which Verizon seeks protection is generally known to or easily acquired by appropriate means by its competitors. Given the penetration rate in the market in which Verizon competes, its competitors easily may discover the number of Verizon subscribers. Verizon is competing for subscribers in municipalities where most residents already receive cable service. The most recently available estimates report that no less than 87 percent of all households in the Boston Designated Market Area ("DMA") receive cable service. Warren Communications News 2006 Television and Cable Factbook, Cable Volume 2, at F-9. This is the second-highest cable television penetration rate in the United

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[4](…continued)
level, the subscriber total would be confidential only if the amount of the check the municipality receives from Verizon is also kept confidential.

States; only Honolulu has a higher penetration rate.[5] Id. Because of this, the penetration rate cannot be expected to increase significantly, if at all, and thus, most subscribers to Verizon's FiOS TV service will be prior subscribers of a competing cable company. By reviewing up-to-date direct broadcast satellite data, which is publicly available, and its own records, the cable operator will know how many subscribers it has lost, and can determine the number of subscribers in the municipality that Verizon has obtained. Verizon's competitors, therefore, will know the approximate number of Verizon subscribers in each community; it will not be a secret to them. Indeed, these competitors will be able to track Verizon's success on a continuous basis, with fresh data, rather than the annual subscriber total reported with the Form 500 and the Annual License Fee calculated as of December 31.

In addition, there are other ways, apart from the loss of subscribers, that cable operators can inform themselves about Verizon's subscriber growth. NECTA, in its Opposition, explained that cable providers learn where Verizon is focusing its marketing efforts by reviewing Verizon's marketing materials for a given municipality (NECTA Opposition at 6). NECTA further noted that cable providers learn whether Verizon has recruited direct broadcast satellite subscribers, by checking up-to-date data provided by satellite providers (id.). Cable providers also visually inspect drop lines from Verizon fiber

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[5] High penetration rates also exist in the other DMAs that include portions of Massachusetts: Springfield is fourth-highest, with an 85 percent penetration level; Providence (which includes Bristol County), is sixth-highest, with an 83 percent penetration level; and Albany (which includes Berkshire County), is tenth, with a 79 percent penetration level. Warren Communications News 2006 Television and Cable Factbook, Cable Volume 2, at F-9-10.

facilities to the cable provider's disconnected subscribers (id.).

Therefore, the Department concludes that since the subscriber numbers are either generally known to the industry or easily acquired through appropriate means, the number of subscribers Verizon serves in a particular community is not a trade secret warranting protection from public disclosure.

The Department next addresses whether the information Verizon seeks to protect from public disclosure is competitively sensitive as Verizon claims. NECTA suggests that subscriber totals have a limited competitive value to competitors. As NECTA observed, the Form 500 Annual Report of Complaint Data does not require information on levels of service, premium subscribership, pay-per-view, digital video recorders and other ancillary video services that if disclosed on a municipal basis might justify proprietary treatment (id.).[6] The only numbers reported, with both the Form 500 and the Annual License Fee, are the numbers of basic service tier subscribers.

Significantly, Verizon seeks confidentiality for information that Massachusetts cable operators have always provided publicly to the Department and to issuing authorities, since the enactment of G.L. c. 166A in 1971. Verizon argued that the Cable Division should adjust to a

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[6] Verizon in its Motions used the terms "area" and "geographic area" when discussing the number of subscribers for which it seeks confidential treatment but subscriber totals on Form 500 and the Annual License Fee are only reported on an issuing authority or municipal basis. Annual subscriber totals only provide information about the total municipality. They do not provide information about subscriber growth in specific neighborhoods within the municipality, information which, incidentally, the cable operators will possess as they monitor changes in their subscribership.

changing competitive landscape in Massachusetts (February 1, 2007 Motion at 5; March 15, 2007 Motion at 5). However, as both NECTA and RCN emphasized in their Oppositions, cable competition is Massachusetts has existed since the late 1990s (NECTA Opposition at 3, 6-7; RCN Opposition at 1). Other competitive providers such as RCN, Braintree Electric Light Department ("BELD") and Norwood Light Department ("NLD") have routinely submitted this type of information, as have all other Massachusetts cable operators, without seeking confidential treatment.[7] Verizon has presented no argument in favor of the proposition that its subscriber totals are somehow more sensitive than those of these three other competitors. That other competitive entrants, such as RCN, BELD and NLD, have not sought protective treatment of their subscriber data further convinces the Department that municipal subscriber data does not merit protection. Accordingly, the Department concludes that Verizon has not met its burden of establishing that the information for which it seeks protection from public disclosure is competitively sensitive.

Finally, in support of its position, Verizon argues that the information it seeks to protect is unrelated to the core purpose of the Form 500, and the "neither the purpose of, or the requirements contained in G.L. c. 166A, § 10, would be impeded in any way by protecting the number of Verizon MA's FiOS TV subscribers in a given city or town" (February 1 Motion at 6). The Department concurs with NECTA that for the Form 500 to be useful, the

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[7] In addition to the annual filings at issue in this matter, cable operators subject to rate regulation report subscriber numbers on the Federal Communication Commission ("FCC") Form 1240 filed with the Department. See Instructions for FCC Form 1240.

size of the "data set," i.e., the total number of subscribers, needs to be publicly available. Indeed, keeping the total number of subscribers confidential would undermine the statutory mandate contained in Section 10. See G.L. c. 166A, § 10. Regarding the Annual License Fee filing, the listing of subscriber totals by community provides a valuable check on the completeness of the cable operator's payment, for both the Commonwealth and municipalities. We note that if the Legislature intended for the amount of payment under Section 9 to be confidential, it would have so provided. Compare G.L. c. 166A, §8 (explicitly providing that a cable operator's annual statement of revenues and expenses, the Form 300, is "for official use only" and therefore protected from public inspection ,while a cable operator's financial balance and statement of ownership, the Form 400, "shall be open to public inspection").

In sum, the Department concludes that Verizon has not met its burden of proving that the information for which it seeks protection is a trade secret or is competitively sensitive such that protection from public disclosure is warranted. Moreover, because the information is available on the municipal level, the information is already in the public domain and therefore

confidential treatment of the information filed with the Department would serve no valid purpose.

VI. RULING

For the reasons cited above, Verizon's Motions for Confidential Treatment dated February 1, 2007, and March 15, 2007 are hereby denied.

By Order of the
Department of Telecommunications and Cable

/s/ Sharon E. Gillett
Sharon E. Gillett
Commissioner

Dated: June 7, 2007

## RIGHT OF APPEAL

Appeals of any final decision, order or ruling of the Department of Telecommunications and Cable may be brought pursuant to applicable state and federal laws.